effort had been made to break the cargo far less to disembark any of it. They said they had lost their way during the night and had anchored to await daylight. They said they were on their way to a neighbouring small port in the State of Singapore and a Singapore grocer was called who said the goods on board were intended for him as part of a barter deal between him and a party in Indonesia. It is, I think, common knowledge that there are great difficulties in the way of trade between Indonesia and Singapore which might well account for the lack of any cargo manifest and I think it is equally common knowledge that the Straits of Malacca are by no means free from piracy which might well account for a small ship being anxious to keep as close as possible to the shore of the Federation.

None of the evidence was in controversy. There was nothing even to suggest that the vessel was not in transit in Federation territorial waters, to suggest that she had entered these waters from the High Seas and her intention was to leave them again for the purpose of crossing over to Singapore. There was nothing even to suggest that she was lying at anchor where she was for any purpose other than the lawful purposes of enabling her people to ascertain their whereabouts and eat their breakfast. Had there been anything else, any purpose that involved any sort of fraud on the revenue or anything else unlawful, then a few hundred yards from the customs house at Kukup is the last place one would have expected to find the vessel peacefully lying at anchor in broad daylight.

The case can be summed up by saying that there was no evidence on which it could be said there was an apparent unlawful purpose involved in the vessel lingering; that if there was no apparent unlawful purpose in the lingering then she was not hovering; that if she was not hovering there was nothing to show that the goods on board were uncustomed; that if the goods were not uncustomed and if they were *bona fide* in transit they were not imported; that there was nothing to suggest they were not *bona fide* in transit; that if they were not imported they were not dutiable goods; and that if they were not dutiable goods it was no offence to carry them in a local craft.

In all the circumstances I have no hesitation in allowing the appeal and setting aside the conviction. The fine paid will be refunded and the order of forfeiture in respect of the ship and cargo automatically falls to the ground.

Appeal allowed.

JULAIKA BIVI v. MYDIN

[O.C.S. (Neal J.) June 29, 1961]

[Ipoh — Civil Suit No. 191 of 1960]

Land Laws — New holder of Temporary Occupation Licence — Ejectment of occupier who came into possession with consent of previous holder — Question of trespass.

In his statement of claim the plaintiff, the holder of a Temporary Occupation Licence, alleged that the defendant was in wrongful occupation of a house on the said land and prayed for an order of ejectment plus damages for trespass, costs and ancillary relief. At the time the plaintiff received her Temporary Occupation Licence the defendant was in possession of part of the house, he having been in possession with the consent of the previous holder of the Temporary Occupation Licence. The defendant pleaded that he was in possession.

Held: (1) an action for ejectment in tort will lie at the instance of a holder of a Temporary Occupation Licence against a trespasser;

(2) although as against the original holder of the Temporary Occupation Licence when he went into possession the defendant would never become a trespasser, as against the plaintiff he was a trespasser when the previous title was cancelled with the consent of the holder and a fresh Temporary Occupation Licence issued;

(3) even if the defendant were not a trespasser in land, the plaintiff was entitled to recover possession and mesne profits on the facts and the statement of claim should be amended thus.

The correctness of the defendant's form of pleading doubted.

Hill v. *Tupper* (2) and *Errington* v. *Errington* (7) distinguished, *Mason* v. *Clarke* (3) and *Bristow* v. *Cormican* (4) followed.

Cases referred to:—

(1) *Danford* v. *McAnulty* (1882-3) 8 App. Cas. 456, 458.
(2) *Hill* v. *Tupper* 159 E.R. 51.
(3) *Mason* v. *Clarke* [1955] A.C. 775.
(4) *Bristow* v. *Cormican* (1877-8) 3 App. Cas. 641.
(5) *Glenwood Lumber Co. Ltd.* v. *Phillips*, [1904] A.C. 405.
(6) *H.E. Wijesuria* v. *Attorney-General for Ceylon* [1950] A.C. 493.
(7) *Errington* v. *Errington* [1952] 1 K.B. 290.
(8) *Cobb* v. *Lane* [1952] 1 All E.R. 1199.

CIVIL SUIT.

S. A. Lingam for the plaintiff.
N. H. Chan for the defendant.

Cur. Adv. Vult.

Neal J. (delivering oral judgment): The plaintiff in these proceedings sued the defendant on a statement of claim alleging that she is the licensee of the piece of State land, a full description of which she includes in her statement of claim, that the defendant has been and still is in wrongful occupation of the said house on the land and that despite demands made by the plaintiff upon the defendant he continues to remain in wrongful occupation, and the plaintiff prays for an order of ejectment plus damages for trespass, costs, and ancillary relief.

The defendant in his statement of defence pleads merely that he is in possession.

During the course of the hearing, I drew attention to the form of the statement of defence, and counsel relied upon a decision of the House

of Lords, in particular, the decision of the Lord Chancellor in *Danford* v. *McAnulty*.[1] I have considered that judgment and I see no reason for changing the view that I expressed at the hearing. I feel, however, that I ought to point out that that case was dealing with a set of Supreme Court Rules which differ materially not in the rule relied upon by the defendant but in the other rules and the inclusion of rules which have no counterpart with the rules with which the House of Lords were dealing. I find it, for reasons which will be perfectly clear as my judgment continues, unnecessary to decide whether that method of pleading was correct or not. I will content myself with saying that there is extreme doubt, having regard to a number of additional rules in our Supreme Court Rules, as to whether the effect of the rule relied upon is the same as it was when the matter was decided in the House of Lords in 1882.

The plaintiff gave evidence and she and her witnesses were cross-examined. The defendant gave no evidence on his own behalf, and, I think, on the facts, the plaintiff has proved her statement of claim. She established that she was granted Temporary Occupation Licence by government, the previous holder having surrendered his licence; that there was on the land the building which was in law a fixture; that at the time she received her Temporary Occupation Licence the defendant was in possession of part of the house, he having been in possession with the consent of the previous holder of the Temporary Occupation Licence. The plaintiff was in possession for a period of months but owing to disagreements and troubles between the respective families she left the premises and took these proceedings. She served upon the defendant what may be adequately described as a notice to quit. These facts were not really attacked by the defence. The defence was content to rely upon the submission that the plaintiff was a licensee and that an action in trespass in tort will not lie at the instance of a licensee.

At the hearing I expressed the opinion that as I understood the authorities on the subject that submission was good in respect of a licensee who had a non-exclusive licence if I may use that phrase, i.e. that his licence did not entitle him or give him any title to prevent any other person from going on the land. Had that been the only point in issue then as I said at the time I would not have reserved my decision but I was worried at the time and said so as to whether this man was a trespasser or whether he was in the position of a tenant whose tenancy had been cancelled and who in law could not become a trespasser. However, since I have reserved my judgment, it is as well that I should deal with the point raised by the defence and in which I found little merit at the hearing.

The defence relied upon two quotations from *Clarke & Lindsell on Torts*, 11th Edition, at page 520 and at page 539. The reference may be summarised, I think, without injustice to the submission, as a statement that ejectment does not lie at the instance of a licensee. The authority for the statement in *Clarke & Lindsell* is the old case of *Hill* v. *Tupper*[2] which was not quoted to me on the ground that the report was not available. I have found the report of the case in Volume 159 of the English Reports at page 51 and it is apparent from the judgment of Pollock, C.B., in that case that the Court was not going to create titles to land which were not already permissible either by statute or by common law, and in his judgment Pollock, C.B., says:

> "After the very full argument which has taken place, I do not think it necessary to assign any other reason for our decision than that the case of *Akroyd* v. *Smith* (10 C.B. 164) expressly decided that it is not competent to create rights unconnected with the use and enjoyment of land, and annex them to it so as to constitute a property in the grantee. This grant merely operates as a licence or covenant on the part of the grantors, and is binding on them as between themselves and the grantee, but gives him no right of action in his own name for any infringement of the supposed exclusive right."

Now, the facts of that particular case were that a licence had been given to the plaintiff to have boats for hire on a lake. On the shores of that lake defendant maintained a hotel and for the benefit of his guests he provided boats. It is clear on the facts of that case that the Court in *Hill* v. *Tupper* was dealing with what was as I have described a non-exclusive licence. At the hearing I asked whether there was any distinction between the licence in *Hill* v. *Tupper* and a Temporary Occupation Licence as in this case which is issued by virtue of rules made under the Land Code where we have express reference to this as a qualified form of title, which Temporary Occupation Licence gives to the holder of it the right to exclude others. Some support for the distinction which I had drawn is to be found in the latest edition of *Salmond on Torts*, 12th Edition, at page 212 where the following quotation appears:—

> "Although a licensee has an action for damages for breach of contract against the licensor for any disturbance of the licence committed by him, he has, it would seem no remedy at law against any subsequent owner or occupier or any stranger for a disturbance of his right for he has no legal estate or interest in the servient land. This was decided in the case of *Hill* v. *Tupper*, in which the plaintiff had acquired by grant under the seal of a canal company an exclusive right of keeping pleasure-boats for hire upon the canal."

It continues —

> "This absence of a remedy by way of damages available to a licensee against a stranger is a very anomalous feature of our law. It seems curious that he who, by agreement with the occupier of a building has expended money in painting advertisements upon one of its walls should have no civil remedy against a third person who wilfully defaces them. There is, however, one important class of licences to which the rule in *Hill* v. *Tupper* has no application — namely, those in which the licence is of such a nature that it would, if created by deed or prescription, amount to a legal easement or profit. Thus in *Mason* v. *Clarke*[3] the appellant had the benefit of an oral agreement entitling him to catch rabbits on the Hothorpe estate (a profit *à prendre*); the House of Lords held that he could recover damages from the respondent for his interference with the exercise of those rights."

Mason v. *Clarke* [3] at page 794 contains the following statement of the law by Viscount Simonds:—

"The next plea that I must examine is of a technical character and, as I have had the privilege of reading what my noble and learned friend, Lord Morton of Henryton, has to say about it and agree with him, I need say little. The plea, as I understand it, is that Mason had, before December 30, 1950, neither a legal right nor a right enforceable in equity to the profit *à prendre* and therefore could not complain of any interference with the exercise of his rights. It is true that he had no legal title, but I concur with my noble friend in thinking, for the reasons that he gives, that Mason had a clear equitable title. If and so far, therefore, as it is necessary to buttress actual possession of a profit *à prendre* with a title of ownership, that condition is in this case fulfilled and this plea also fails. I express myself with this qualification, for as was said in *Bristow* v. *Cormican* [4], possession 'for however short a period' (*per* Lord Cairns, L.C.) 'the slightest amount of possession' (per Lord Hatherley) of a profit *à prendre* is sufficient to support an action for trespass against a wrongdoer, and in the view which I take and have already expressed Mason was in possession of the profit *à prendre* and the respondent was none the less a trespasser upon that incorporal hereditament because he was himself the occupier of the land and had certain rights under the Ground Game Act. I should not therefore myself have thought it necessary to consider more than the possessory title, but inasmuch as the matter has been put in issue I wish to express my concurrence with the noble Lord."

In that case they were referring to two judgments in *Bristow* v. *Cormican.* [4] For myself, I find support in this case in a quotation from the judgment of Lord Cairns, L.C., at the top of page 652:

"Now a documentary title commencing with some person rightfully in possession, or who has an admitted or proved right to be in possession, and connecting itself with a plaintiff in an action of trespass, would, generally speaking, and in the absence of any title in the defendant by adverse possession, be sufficient to maintain an action of trespass."

For these reasons, I am convinced that these proceedings are properly maintainable by the plaintiff in this case and that an action for ejectment in tort will lie at the instance of a holder of a Temporary Occupation Licence against a trespasser.

Counsel for the defendant relied upon the *dicta* in an unreported judgment of Good J., in Perak O.S. 53/58. It is true that certain statements relied upon by him do appear to support this submission that he made based upon *Hill* v. *Tupper.* For myself, I doubt whether his Lordship Mr. Justice Good did go or intended to go as far as counsel's submission has taken the question. His Lordship, according to the record of this Court, was dealing with an application by an administratrix of the deceased husband's estate for an order that a house (in law, a fixture) on the land formerly held by the deceased under Temporary Occupation Licence and at all relevant and subsequent times after his death held by the respondent in those proceedings was the property of the estate. Read in conjunction with the knowledge of the facts which I obtained from the record I am of the opinion that his Lordship's words had reference back to the facts of that particular case only and do not support the submission made on behalf of the defendant. If I am wrong in that explanation of his Lordship's judgment, then, with regret, on the authority to which I have referred, I feel I am bound to say I cannot agree with him if his judgment does amount to authority for the statement that the holder of a Temporary Occupation Licence cannot eject a trespasser. For these reasons I find no merit in the defence put forward.

The other question, however, has caused me considerable concern — namely, whether the defendant in this case was in law a trespasser or not. I am aware that the term, "ejectment," nowadays is almost synonymous with proceedings for the recovery of land. Nevertheless, the statement of claim is perfectly clear that the claim is for ejectment as against a trespasser not as against a person who had certain rights which has ceased to exist. The authorities, I think, are clear on the subject and may be summarised in the statement that trespass normally relates to a wrongful entry but a person properly in possession refusing to get out may become a trespasser; and, finally, that a tenant holding over at the expiration of his tenancy does not become a trespasser. The answer to the problem, to my mind, arises out of the particular facts in this case. As against the original holder of the Temporary Occupation Licence when he went into possession then it is perfectly clear that the defendant would never become a trespasser but that title having been cancelled with the consent of the holder and a fresh Temporary Occupation Licence issued, to my mind, establishes the defendant as a trespasser in law. I would therefore make the order for ejectment that has been asked for.

Coming to the question of damages, the plaintiff gave evidence to the effect that he considered $20 as rent for that house and I think that was a reasonable figure. However, in cross-examination of the prior holder of the Temporary Occupation Licence, the defendant established that the rental which he (the defendant) paid to the previous holder was $12 per month. The plaintiff, as I have said, was in possession of part of the house; she chose to leave to avoid trouble. However, in the light of these facts, it seems to me that damages should be assessed on the basis of $12 per month from the date of the plaintiff's Temporary Occupation Licence down to date and there will be judgment for that amount.

In this world today there is always room for differences of opinion and if I am wrong in finding the defendant a trespasser then I should have no hesitation whatsoever on the facts of this particular case in exercising the power vested in me to make all consequential amendments to enable the real controversy between the parties to be determined by amending the statement of claim to provide for a claim for possession and mesne profits. If I were wrong in my previous finding and he was not a trespasser then I would have ordered possession of

the premises to the plaintiff and mesne profits assessed upon the same basis as I have assessed the damages.

The plaintiff is entitled to her costs to be taxed by the Senior Assistant Registrar.

(After discussion with counsel). Warrant of ejectment to be issued at the expiration of one month from today.

NOTE: On checking the record of this judgment I note that although I had intended to do so I have overlooked referring to the judgment of the Privy Council in *Glenwood Lumber Co. Ltd.* v. *Phillips* [5] as authority for the statement that whether an instrument operates as a licence or a demise is a question not of words but of substance, and *prima facie* if exclusive possession is given it is a lease even if it is called a licence. A similar authority is to be found in *H.E. Wijesuria* v. *Attorney-General for Ceylon.* [6] I would distinguish *Errington* v. *Errington* [7] and *Cobb* v. *Lane* [8] on the ground that the family relationships in each case established lack of intention to create legal consequences. There was before me no evidence of any such lack of intention as between the State of Perak and the plaintiff.

Claim allowed.

Solicitors: *S. A. Lingam; Gibb & Co.*

REGINA v. CHONG SONG CHUN

[A. Cr. J. (Wee Chong Jin J.) July 5, 1961]

[Singapore — Magistrate's Appeal No. 58 of 1961]

Criminal Law and Procedure — Discharge of accused amounting to an acquittal after properly refusing an application by the prosecution for an adjournment — Criminal Procedure Code (Cap. 132), ss.170, 172(f), 172(g) and 175.

Respondent being the managing partner of Soon Teck Finance Co., had been charged with 11 charges under the Moneylenders Ordinance, 1959. These 11 charges were consolidated into one charge on the date of hearing. The accused claimed trial to both sets of charges. After hearing two witnesses for the prosecution the Court ordered the trial to proceed on one of the original 11 charges and at the close of the case for the prosecution the Court acquitted the respondent on this charge. Thereupon the prosecution applied for an adjournment of the remaining charges to enable it to call a witness. Counsel for the defence objected to the application whereupon the Court made an order of acquittal on the remaining 10 charges.

Held: it was clear from the provisions of the Criminal Procedure Code and on the authority of *Kuppusamy* v. *Public Prosecutor* [1], that the learned Magistrate had no jurisdiction to make the order of acquittal which he made.

Case referred to:—

(1) *Kuppusamy* v. *Public Prosecutor* [1948] M.L.J. 25.

MAGISTRATE'S APPEAL.

M. Coomaraswamy (Deputy Public Prosecutor) for the appellant.

David Chelliah for the respondent.

Wee Chong Jin J. (delivering oral judgment): This appeal must be allowed.

The facts are not substantially in dispute, although it would appear that the prosecution were attempting, in view of the twelve charges appearing on the record, to charge the accused in respect of eleven separate offences, and on the twelfth charge for an offence which embraced the eleven separate offences. Be that as it may, the trial proceeded on the basis that the accused was charged and had claimed trial on the twelve charges and after hearing two witnesses the learned Magistrate decided to limit the trial and to hear evidence relating to only one of the twelve charges. After the case for the prosecution was concluded, the learned Magistrate came to the view that the prosecution had failed to prove its case, and accordingly acquitted the accused on that particular charge, but when the prosecution applied for adjournment on the remaining charges the learned Magistrate, although properly exercising his discretion in refusing the adjournment, then went on to acquit the accused, it would seem, on only ten out of the remaining eleven charges.

This appeal is against the order of acquittal in respect of those ten charges, and it seems clear from the provisions of the Criminal Procedure Code and on the authority of *Kuppusamy* v. *Public Prosecutor* [1] that the learned Magistrate had no jurisdiction to make the order of acquittal which he made.

The record being as it is, I will direct that in place of the order of acquittal there should be substituted an order of discharge on ten charges. Now, on the face of the substituted order it would appear that, as it stands, it would not be possible to say which of the ten out of the remaining eleven charges have been disposed of in this manner, and I think it is a question for consideration by the Public Prosecutor, on the facts of the matter as it now stands and in view of the way the charges have been formulated, to consider whether this is not a fit case where there should be finality to all these proceedings. It is, however, a matter for the Public Prosecutor.

My formal order would be that the order of acquittal on ten charges be reversed and there be substituted therefor an order of discharge, however unsatisfactory that may be.

Appeal allowed.

Solicitors: *Drew & Napier.*